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No. 99-5525

In The

Supreme Court of the United States

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS GENERAL OF THE UNITED STATES WILLIAM P. BARR AND EDWIN MEESE III SUPPORTING AFFIRMANCE

ANDREW G. MCBRIDE
Counsel of Record for Amici Curiae
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

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INTEREST OF *AMICI CURIAE*

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. The Honorable William P. Barr also served as Deputy Attorney General of the United States from 1990 to 1991 and as Assistant Attorney General, Office of Legal Counsel from 1989 to 1990. The Honorable Edwin Meese III also served as Deputy District Attorney for Alameda County, California from 1959 to 1967 and as Vice Chairman of the California Organized Crime Control Commission from 1976 to 1980. *Amici* have a strong interest in promoting fair and effective law enforcement and believe that the statute at issue in this case, 18 U.S.C. § 3501, is consonant with that goal. *Amici* are also uniquely qualified to inform the Court as to the past positions of the United States Department of Justice regarding the constitutionality of Section 3501 and the harmful effects upon the administration of justice wrought by rigid adherence to the exclusionary rule of *Miranda v. Arizona*, 384 U.S. 436 (1966).[1]

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[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than *amici curiae* or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of those written consents have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), announced a prophylactic rule that is not itself required by any provision of the United States Constitution. That fact, stated in *Miranda* itself, is confirmed by the twenty-five years of this Court's *Miranda* jurisprudence since *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). It is undisputed that *Miranda* thus "overprotects" the constitutional values at stake, and results in the suppression of voluntary and highly probative statements in federal criminal trials. *See* Brief for the United States ("Gov't Br.") at 31 ("There are undeniably instances in which the exclusionary rule of *Miranda* imposes costs on the truth-seeking function of a trial, by depriving the trier of fact of 'what concededly is relevant evidence.' ") (quoting *Colorado v. Connelly*, 479 U.S. 157, 166 (1986)). This Court's numerous decisions allowing the admission of evidence taken without strict compliance with the *Miranda* warnings cannot be reconciled with the proposition that the warnings are themselves required by the Fifth Amendment. In particular, the "public safety" exception recognized in *New York v. Quarles*, 467 U.S. 649 (1984), is flatly inconsistent with the view espoused by Petitioner, the Government, and their supporting *amici* that the warnings themselves are a constitutional requirement. This Court's decision in *Miranda* expressly invited legislative experimentation in the area of the law of confessions. Nor was that invitation, as Petitioner would have it, limited to mere adjustments in the phraseology of the warnings themselves.

As Attorneys General of the United States, we took the official position that *Miranda* was a non-constitutional prophylaxis, that Section 3501 was a fair and balanced

response to the *Miranda* Court's invitation to legislative action, and that Section 3501 was fully constitutional. Federal prosecutors were free to raise the statute in response to suppression motions in federal court during our tenure. Pursuant to our general duty to defend federal statutes, we stood ready to defend the constitutionality of Section 3501 in the courts of appeals and before this Court. The position taken by the Department of Justice as respondent in this case is thus a sharp break with the Department's past positions and, in our view, is inconsistent with its solemn duty to defend the validity of all federal statutes unless no reasonable argument can be made in support of their constitutionality.

Rigid application of the suppression rule of *Miranda* does hinder effective law enforcement on both the state and federal levels. Particularly in the prosecution of drug trafficking cases, the cooperation of members of a conspiracy is critical to effective prosecution of the drug enterprise root and branch. As the memoranda lodged with the Court demonstrate, the Drug Enforcement Administration ("DEA") expressed these concerns to the Department of Justice and urged the Department to defend Section 3501. The Federal Bureau of Investigation ("FBI") expressed similar concerns regarding some of the sub-doctrines spawned by *Miranda*. This complex of subdoctrines that surrounds the *Miranda* decision can be mystifying to even the most well-trained law enforcement officers. Replacing *Miranda*'s focus on the subsidiary issues of "custody" and "interrogation" with the examination by the trial court and the jury of the central issue of voluntariness will advance Fifth Amendment values and the accuracy of criminal verdicts.

Section 3501 is a measured and balanced response to the admission of confessions in federal court. It allows the trial judge to place whatever weight is appropriate upon the various factors that can affect the knowing and intelligent waiver of constitutional rights. Moreover, it ensures that the jury will also be allowed to weigh these same factors – thus creating a strong incentive for law enforcement officers to continue to give the warnings. Particularly since federal law enforcement officers are well-trained and have uniformly represented that they will continue to employ the *Miranda* warnings, Section 3501 is a fully constitutional response to the admission of confessions in federal court. The Court should continue to adhere to *Miranda* in state prosecutions until confronted with a State's concrete response to the *Miranda* Court's legislative invitation.

ARGUMENT

I. The *Miranda* Warnings Are Not Required by the Constitution.

In *Miranda* itself, the Court recognized the limits of its ruling and the fact that the Legislative Branch had a role to play in determining the admissibility of confessions in federal court. At the outset, the Court characterized its holding as requiring the exclusion of a criminal suspect's statement unless the prosecution "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. The Court emphasized that legislative authority remained intact in this area:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.

Id. at 467. The *Miranda* Court's recognition that the Constitution itself does not dictate use of warnings and its discussion of legislative "creativity," are fatal to Petitioner's view that *Miranda* disables the legislature from adopting a different approach. *See also id.* at 477 ("[u]nder the system of warnings we delineate *today or under any other system which may be devised and found effective*") (emphasis added).

Petitioner and the United States would convert the *Miranda* Court's invitation to legislative action into an empty gesture. Brief of Petitioner ("Pet'r Br.") at 18; Gov't Br. at 30-33. Under their view, all that a legislature can do is slavishly adopt the essence of the *Miranda* warnings. However, as the portions of the *Miranda* opinion cited above demonstrate, the Court was not discussing mere grammatical variations when it recognized legislative authority in this area. Criminal procedure is an area of shared legislative and judicial authority. *See Mistretta v. United States*, 488 U.S. 361, 384-91 (1989).[2] The *Miranda* opinion itself certainly does not support the notion that

[2] *See also Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of the federal courts . . . . ").

the Court was invoking its authority under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to preclude any further Article I role in assessing the admissibility of confessions in federal court. *See Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("The *Miranda* rule is not, *nor did it ever claim to be*, a dictate of the Fifth Amendment itself.") (emphasis added).[3]

This insight from the text of the *Miranda* opinion itself is confirmed by subsequent decisions of this Court. Try as they might, Petitioner, the Government, and their *amici* simply cannot reconcile the language of these opinions and, more importantly, their results with the view that *Miranda* warnings are required by the Fifth Amendment. *See, e.g., Tucker*, 417 U.S. at 444 ("The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures designed to insure that the right against compulsory self-incrimination was protected."); *Quarles*, 467 U.S. at 658 ("[A]bsent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence . . . . "); *Moran v. Burbine*, 475 U.S. 412, 424-25 (1986) ("As is now well established, [the] . . . *Miranda* warnings are not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory

[3] Indeed, the Fifth Amendment itself states in relevant part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The concept that unwarned but nonetheless knowing and voluntary confessions violate this command would seem to confront an insurmountable textual hurdle.

self-incrimination [is] protected.") (internal quotations omitted; citations omitted). The attempt to reconcile this twenty-five year line of precedents with the view that the warnings are constitutionally required reduces the Government to exercises in linguistic nonsense. *See, e.g.*, Gov't Br. at 40 ("[T]he Court's statements that *Miranda*'s 'prophylactic' requirements sweep more broadly than does the Self-Incrimination Clause itself do not invalidate *Miranda*'s status as a Fifth Amendment decision.").[4]

Even more troubling, if Petitioner and his supporters are correct in their view of *Miranda* as a constitutional mandate, this Court's decision in *Quarles* must be reexamined. If the warnings themselves are constitutionally required, then *Quarles* improperly sanctions the admission in the government's case-in-chief of evidence taken in violation of the Fifth Amendment.[5] A host of other doctrines would also require reexamination, notably the Court's refusal to apply the "fruit of the poisonous tree" doctrine to *Miranda* violations. If the warnings constitute a "core" constitutional necessity (like probable cause in

[4] This statement is either self-contradictory or suggests that *Miranda* is based on some part of the Fifth Amendment other than the Self-Incrimination Clause. Its tortured nature highlights the dilemma faced by those who would attempt to erase the significance of twenty-five years of this Court's jurisprudence since *Michigan v. Tucker*, 417 U.S. 433 (1974), that treats *Miranda* as a non-constitutional decision.

[5] The *Quarles* decision has been critical to law enforcement's ability to defuse dangerous situations to the benefit of the victims of crime. *See generally* Concern for Possible Victim (Rescue Doctrine) as Justifying Violation of Miranda Requirements, 9 A.L.R. 4th 494 (1981 & 1988 Supp.) (listing cases).

the Fourth Amendment context) then there is no ground for exempting them from the doctrine announced in *Wong Sun v. United States*, 371 U.S. 471 (1963). Therefore, the Court would have to reexamine the result in *Oregon v. Elstad*, 470 U.S. 298 (1985), in light of any ruling that unwarned confessions are themselves taken in violation of the Fifth Amendment.

Indeed, as early as 1969, the Department of Justice took the position that the *Miranda* warnings were not a constitutional requirement and that Section 3501 was therefore within Congress' power over the admission of evidence in federal court. *See, e.g.*, The Improvement and Reform of Law Enforcement and Criminal Justice in the United States: Hearings Before the House Select Committee on Crime, 91st Cong., 1st Sess. 250 (1969) (statement of Attorney General John N. Mitchell). *See also* Memorandum from Will Wilson, Assistant Attorney General Criminal Division to United States Attorneys (June 11, 1969), *reprinted in* 115 Cong. Rec. 22,236-37 (1969). In 1986, the Department of Justice undertook a detailed analysis of *Miranda*, this Court's post-*Miranda* jurisprudence, and Section 3501. *See* Report of the Attorney General on the Law of Pre-Trial Interrogation (Feb. 12, 1986), *reprinted in* 22 U. Mich. J.L. Ref. 437 (1989). That Report concluded that Section 3501 was a valid congressional response to *Miranda*'s legislative invitation.

Consistent with the Department of Justice's position since 1969, it was our policy as Attorneys General of the United States that Section 3501 was constitutional and that it should be raised by United States Attorney's

Offices in defense of motions to suppress.[6] The present position of the Department of Justice is a sharp reversal of years of practice and, in our view, is inconsistent with the important duty of the Department of Justice to defend all federal statutes unless no reasonable argument can be made as to the statute's constitutionality.[7] This Court should reject the arguments of Petitioner, the Government, and their *amici* and instead reaffirm the proposition that the warnings themselves are not constitutionally required. The Court should decline Petitioner's invitation to undermine the doctrinal underpinnings of the Court's holdings in *Tucker*, *Elstad*, and *Quarles*.

II. Inflexible Application of the *Miranda* Decision and Its Progeny Hinder Effective Law Enforcement.

As former Attorneys General of the United States, *amici* collectively represent years of experience as the Nation's chief law enforcement officer. We can tell the Court without hesitation that the unyielding application

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[6] We have attached as an appendix to this brief, letters written by each of the *amici* and Attorney General Dick Thornburgh in response to an inquiry from Senator Thurmond regarding the position of the Department of Justice from 1985 through 1993 regarding the constitutionality of Section 3501. These letters conclusively establish that any characterization of the Department of Justice's present position as "longstanding" has no basis in fact.

[7] Indeed, the fact that the United States Attorney's Office raised Section 3501 in its reconsideration motion before the district court in this very case provides further evidence that the Department's position that Section 3501 is unconstitutional is a newly-minted one.

of *Miranda* and the complex of sub-doctrines it has spawned does indeed have a detrimental effect on enforcement of the federal criminal law. *Miranda* has its most dramatic negative impact in the area where effective law enforcement is most critical to our Nation's future – drug trafficking prosecutions.

We respectfully disagree with the assertion of the Government and certain *amici* that *Miranda* is beneficial to law enforcement officers because its strictures "provide clear guidance to law enforcement officers." Gov't Br. at 9-10; Brief of Griffin B. Bell, *et al.* as *Amici Curiae* in Support of Petitioner ("Bell Br.") at 11-19. In fact, application of *Miranda* itself is dependent on a highly fact-bound inquiry into the nature of "custody" and the nature of "interrogation." *See, e.g., Elstad*, 470 U.S. at 309 ("[T]he task of defining 'custody' is a slippery one."); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("interrogation" defined as "any words or actions on the part of police (other than those normally attendant to arrest and custody) that they should have known were reasonably likely to elicit an incriminating response from the suspect") (footnotes omitted); *id.* at 305 (Marshal, J., dissenting) (agreeing with two-part test but disagreeing with its application to the facts before the Court); *see also id.* at 307, 312-13 (Stevens, J., dissenting) (discussing use of interrogatory or declarative sentences as bearing on the presence or absence of interrogation).

As the transcript of the suppression hearing in this case demonstrates, examination of the issues of "custody" and "interrogation" *already* requires the district court to take the very same evidence necessary to evaluate voluntariness under Section 3501. See Joint Appendix ("J.A.") at 35-74 (Testimony of Special Agent Lawlor).

Miranda saves no judicial resources and, by focusing on the subsidiary issues of "custody" and "interrogation," distracts judicial inquiry from the central constitutional issue; *viz.*, was the statement compelled or voluntary?

Moreover, many of the complicated sub-doctrines flowing from *Miranda* can act as a trap for even the best-trained police officers. The Government concedes (as it must given the lodged letters from DEA and FBI) that these doctrines flowing from *Miranda* do have substantial law enforcement costs. Gov't Br. at 31-37. Fair, honest and good faith decisions by police officers regarding "custody," *see Thompson v. Keohane*, 516 U.S. 99, 112 (1995), "interrogation," *see Innis*, 446 U.S. 291, or whether rights have been invoked, *see Davis v. United States*, 512 U.S. 452 (1994), that are later adjudged incorrect in federal court often result in the suppression of voluntary and probative confessions of guilt. The doctrines of *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988), can result in the exclusion of probative evidence years after invocation, in another jurisdiction, during questioning regarding a different crime.

The Government responds that a "good faith" exception, similar to that recognized in *United States v. Leon*, 463 U.S. 889 (1983), in the Fourth Amendment context, may be appropriate for some of the *Miranda* subdoctrines. Gov't Br. at 35-36 & nn.25 & 26. How *Edwards* and *Roberson* can be decoupled from what the Government otherwise refers to as the "core holding of *Miranda*," *id.* at 31, is nowhere explained in the Government's submission. If, as the Government contends, the warnings themselves *and* some mechanism to ensure that the exercise of the rights contained in the warnings will be "scrupulously

honored," Gov't Br. at 28 (quoting *Miranda*, 384 U.S. at 478-79), is a constitutional minimum dictated by the Fifth Amendment, then no relaxation of the *Edwards* or *Roberson* doctrines is constitutionally permissible. If the Government does in fact support a "good faith" exception to certain *Miranda* doctrines, then *per force* it concedes the constitutionality of Section 3501, at least in *Edwards* and *Roberson* cases, because Section 3501 is essentially a good faith rule. The statute allows the Court to admit probative, voluntary statements where (as here) federal agents make a technical error under *Miranda* or its progeny and both a judge and a jury conclude that the error did not result in unconstitutional compulsion.[8]

Respondent's brief represents that, "federal law enforcement agencies have concluded that the *Miranda* decision itself generally does not hinder their investigations and the issuance of the *Miranda* warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect." Gov't Br. at 34. After the filing of the Government's brief, Professor Cassell, counsel appointed by the Court to defend the judgment, requested the letters written by law enforcement agencies in response to a Justice Department inquiry regarding the effects of *Miranda*. Those letters, now lodged with the Court, tell a very different story from that suggested in the Government's brief. As noted

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[8] We respectfully suggest that the Court inquire of the Government at oral argument whether, as its brief intimates, it supports a "good faith" exception to the *Edwards-Roberson* rules, which the Government seems to concede are not constitutionally required and do present a substantial problem for law enforcement.

above, the Memorandum from the FBI details significant law enforcement problems created by application of the Court's interpretations of *Miranda* in *Edwards v. Arizona* and *Minnick v. Mississippi*, 498 U.S. 146 (1990). See Memorandum from Larry R. Parkinson, General Counsel, FBI, to Eleanor D. Acheson, Assistant Attorney General, OPD, at pp. 1-2 (Oct. 19, 1999). The FBI Memorandum indicates that these applications of *Miranda* "have had an impact on numerous FBI investigations." *Id.* at 2.

Two lodged memoranda from the DEA are even more illuminating. One DEA memorandum flatly states: "[W]e believe that the automatic exclusion from evidence of all statements that do not comply with the *Miranda* rule is harmful to the administration of justice." Memorandum from Robert C. Gleason, Deputy Chief Counsel, DEA, to Patty Stemler, Department of Justice, Criminal Division, Appellate Section, p. 1 (undated). This memorandum urges the Department of Justice to defend Section 3501 in no uncertain terms:

> - We do not think that a relaxation in the exclusionary rule will lead our Agents to disregard *Miranda*, but it could save important evidence in cases where the strict requirements of *Miranda* are not satisfied for some reason that does not affect the voluntariness of the statement. Therefore, we are in favor of seeking such a ruling from the Supreme Court.

Id. A second DEA memorandum from October, 1999 is even more emphatic. The memorandum outlines what every DEA agent and prosecutor in the country knows – breaking large-scale drug trafficking organizations depends upon information provided by members of the

organization under pressure from law enforcement. *See* Memorandum from Richard A. Fiano, Chief of Operations, DEA, to Frank A.S. Campbell, Deputy Assistant Attorney General, Office of Policy Development (Oct. 13, 1999). The memorandum further states: "The methods used by DEA to investigate drug organizations highlight the need to reform the formal, prophylactic requirements of *Miranda*." *Id.* at 1. This DEA memorandum urges the Department of Justice to defend the Fourth Circuit's ruling in this very case. *Id.*[9]

These memoranda belie the Government's representations that *Miranda* has minimal costs and that, on balance, law enforcement supports rigid application of *Miranda*. Indeed, the DEA and FBI alone, which both expressed concerns regarding *Miranda*, account for a large percentage of prosecutions in federal court. The concerns expressed in these memoranda are fully consistent with our own experience as the Nation's chief prosecutors. Moreover, the vast array of state and local law enforcement *amici* supporting the judgment in this case bear witness to the fact that the *Miranda* rule has real

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[9] The Solicitor General has lodged a third DEA memorandum which purports to backtrack from the statements made in the first two DEA memoranda. This extraordinary third DEA memorandum is dated February 22, 2000. Thus, it was created months after the Department of Justice determined its position in this case and four days after Professor Cassell requested that the Solicitor General provide the law enforcement memoranda transmitted to the Department of Justice relative to Section 3501. The circumstances surrounding the creation of this dubious memorandum suggest that it was specifically prepared for this litigation *after* it became clear the other memoranda would have to be released.

costs in evidence lost and guilty criminals escaping any punishment for their crimes.

III. Section 3501 is a Fully Constitutional Congressional Response to Evaluating the Admission of Confessions in Federal Court.

Section 3501 represents a measured and balanced response to the admission of confessions in federal court. First, it retains the requirement of warnings as a factor in the trial court's analysis. Nor does it dictate how much weight this or any other factor should be given by the court. Thus, the presence or absence of warnings can be given whatever weight the trial judge sees fit. In the case of a younger defendant, a first-time offender, or a person of limited education or mental capacity, the absence of warnings might well be a central factor in the court's analysis. By contrast, in the case of an older, college-educated recidivist who specializes in complex bank fraud schemes, the absence of warnings would be of relatively little importance. Second, Section 3501 makes clear that "the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give weight to the confession *as the jury feels it deserves under all the circumstances*." 18 U.S.C. § 3501(a) (emphasis added). Defense counsel can be sure to bring the absence of warnings to the attention of the jury in any case where the arresting officers fail to provide them. This right, plus a jury instruction on the issue, constitutes a significant protection in Section 3501 not contained in *Miranda* itself. Finally, Section 3501 allows the Court to consider whether the suspect was informed of the nature of the offense at issue. *Id.* § 3501(b)(2). This

reveals to the suspect something about the knowledge of the police, while allowing the suspect to evaluate the gravity of his circumstances.

Thus, Section 3501 retains the incentive created by *Miranda* to train police officers to give warnings and to use written waivers of *Miranda* rights. No reputable law enforcement agency would change its policy regarding warnings because they are now simply a factor to be considered by the judge and the jury.[10] Yet, Section 3501 allows society to benefit from competent and constitutionally admissible evidence where police do not give warnings due to inadvertence or a determination concerning custody or interrogation that is later found to be erroneous by a court of law.

In this sense, the revision worked by Section 3501, a statute enacted by Congress, is narrower than the exception to the exclusionary rule recognized by this Court in *United States v. Leon*. Under the *Leon* rule evidence seized in violation of the Fourth Amendment is admitted in federal and state court when the police officers acted in the good faith belief that an arrest or search warrant signed by a magistrate was indeed valid. Under Section 3501, the Fifth Amendment's dictate against compelled confessions is fully respected – they are never admissible

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[10] We thus respectfully disagree with the suggestion in the brief of *amici curiae* Griffin Bell, *et al.* that law enforcement officers will "dispense with warnings and adopt more aggressive interrogation techniques," in response to application of Section 3501. Bell Br. at 18. The disincentives to do so include possible suppression as well as the jury being fully informed of such tactics. In this sense, Section 3501 may be a more effective deterrent to coercive police behavior than is *Miranda*.

in federal court. Moreover, unlike the *Leon* rule, the jury gets to hear and evaluate evidence of the alleged constitutional violation under Section 3501.

We disagree with Petitioner and the Government that the proper framework to evaluate Section 3501 is this Court's *stare decisis* jurisprudence. This is not a case where the Court has simply been asked to reexamine its own precedents. Congress, a coordinate branch with constitutional authority in this area, has expressed its will through legislation. That legislation enjoys a presumption of constitutionality. If *Miranda* is a non-constitutional ruling, no party disputes that Section 3501 must be upheld. Even if *Miranda* has some constitutional underpinnings, Section 3501 easily falls within Congress' authority to establish its own remedial scheme for constitutional violations. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 386 (1983); *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988).

Finally, both Petitioner and the Government seem to contend that, regardless of the legal merits of this case, the notoriety of the *Miranda* warnings and their place in popular culture are extraordinary considerations requiring the Court to invalidate Section 3501. Pet'r Br. at 44-45; Gov't Br. at 49-50. First, this Court is obviously not an arbiter of popular culture, nor should the temperature of the public zeitgeist affect this Court's rulings. Second, Section 3501 is itself an expression of popular will in the uniquely powerful form sanctioned by the Constitution itself – bicameralism and presentment. Third, as demonstrated above, a decision upholding Section 3501 does not "overrule" *Miranda* and will not work any substantial change to federal law enforcement training or practice. It will simply result in the admission of probative evidence

in cases like this one, where well-trained federal officers make a good faith error. Finally, the position taken by Petitioner and the Government ignores the other side of the coin – the public disdain for law enforcement created by a system that elevates technical rules over considerations of guilt and the proper punishment of serious crime. As Justice O'Connor has noted:

> While federal courts must and do vindicate constitutional values outside the truth seeking function of a criminal trial, where those values are unlikely to be served by the suppression remedy, the result is positively perverse. Exclusion in such a situation teaches not respect for the law, but casts the criminal justice system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns.

Eagan, 492 U.S. at 211-12 (O'Connor, J., concurring). Section 3501 offers an opportunity to retain many of the benefits of *Miranda* while mitigating the harm to law enforcement from its more "perverse" applications. The rule of law and the perception of the law is enhanced by such a statute, not diminished.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

March 9, 2000

Respectfully submitted,

THE HONORABLE WILLIAM P. BARR
THE HONORABLE EDWIN MEESE III
Former Attorneys General of the United States

ANDREW G. MCBRIDE
Counsel of Record for Amici Curiae
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600

William P. Barr

July 22, 1999

The Honorable Strom Thurmond
Chairman
Subcommittee on Criminal Justice Oversight
United States Senate
Washington, DC 20515

Dear Mr. Chairman:

This letter responds to your questions regarding the Department of Justice's views and positions on 18 U.S.C. § 3501 during my tenure as Attorney General in the Administration of President George W. Bush. This letter is based on my own recollection as well as consultation with people who served in the Department of Justice during the Bush Administration.

It was the position of the Department of Justice during my tenure as Attorney General that *Miranda v. Arizona's* procedural requirements and its per se exclusionary rule were not constitutionally mandated. We made arguments to this effect in the United States Supreme Court, *see, e.g.;* Brief for the United States as Amicus Curiae in *Withrow v. Williams,* No. 91-1030; Brief for the United States as Amicus Curiae in *Parke v. Raley,* No. 91-719. In some cases, the Department of Justice also participated as amicus curiae in support of the State in the lower federal courts. Our legal position in this regard was based in large part upon the report issued by the Office of Legal policy in the previous administration and upon subsequent Supreme Court decisions which made it clear that the *Miranda* regime was not required by the Fifth Amendment.

We also took the position that 18 U.S.C. § 3501 was constitutional as an exercise of Congress' authority to control the admission of evidence before federal courts. As the senior officer of the prosecuting arm of the Executive Branch, I believed that the Department of Justice should be prepared to use all of the legal tools at its disposal, within constitutional bounds, to seek the conviction of the guilty and exoneration of the innocent. This certainly included making a criminal defendant's voluntary statements regarding the crime available to the finder of fact. Accordingly, during my tenure, the United States Attorneys' Offices were authorized and encouraged to raise 18 U.S.C. § 3501 as an argument for the admission of reliable evidence of guilt that would otherwise be kept from juries by the *Miranda* doctrine. As far as I am aware, no case during my tenure as Attorney General was a United States Attorneys' Office prohibited from relying upon section 3501 in any forum.

In 1991, I instructed a Special Assistant to the Attorney General to undertake the task of locating a test case for the constitutionality of 18 U.S.C. § 3501. Contacts were made with United States Attorneys' Offices to find an appropriate case where the issue could be raised and preserved for appellate review. Although no proper vehicle for pursuing the issue was generated prior to the end of the Administration, the effort demonstrates the Bush Administrations commitment to use and defend section 3501 and seek a definitive adjudication as to its constitutionality.

To summarize, during my tenure as Attorney General of the United States: 1) we adhered to the position of prior Administrations that *Miranda's* procedural requirements

and exclusionary rule were not constitutionally mandated; 2) we took the position that section 3501 was a constitutional exercise of Congress' authority over the admissibility of evidence in federal court; 3) we authorized the United States Attorneys' Offices to use section 3501 to promote the admissibility of reliable evidence of guilt in federal criminal prosecutions; and 4) we stood ready to defend the constitutionality of the statute in the Courts of Appeals and the United States Supreme Court.

I hope this letter is of assistance to you and that it helps to clarify the historical record as to the position of the Department of Justice regarding the constitutionality of 18 U.S.C. § 3501.

Sincerely,

/s/ W P Barr
William P. Barr

Dick Thornburg

October 7, 1999

Honorable Strom Thurmond, Chairman
Subcommittee on Criminal Justice Oversight
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

This letter responds to your questions concerning the positions the Department of Justice took during my tenure as Attorney General on the constitutional status of various aspects of *Miranda* and 18 U.S.C. § 3501.

As to *Miranda*, by the time I became Attorney General, I believe the Department viewed it as clear from the Supreme Court's cases that the warnings set out in that case were not themselves constitutional rights, but were rather, as the Court had by that time said repeatedly, prophylactic devices intended to add an extra layer of protection to the rights set out in the Fifth Amendment. We routinely described the warnings that way in our Supreme Court briefs, *see, e.g., Minnick v. Mississippi*, No. 89-6332, Brief for the United States as Amicus Curiae Supporting Petitioner; *Michigan v. Harvey*, No. 88-512, Brief for the United States as Amicus Curiae Supporting Petitioner, and I assume we did so in our briefs in the lower federal courts.

Likewise, we regularly argued that *Miranda's* exclusionary rule was not constitutionally required, distinguishing it from the rule requiring exclusion of coerced confessions, which came directly from the Fifth Amendment. Therefore, for example, we argued that since a per

se exclusionary rule will inevitable result in the exclusion of some voluntary confessions, Miranda's exclusionary rule should not be applied in cases where the risk of coercion against which Miranda sought to protect was slight, *see, e.g., Minnick v. Mississippi, supra.* Likewise, we argued against application of *Miranda's* exclusionary rule when the additional deterrence that would stem from it was limited, and the harm to the search for truth that a criminal trial is supposed to serve would be great. *See, e.g., Michigan v. Harvey, supra.* We noted that such considerations were legitimate in deciding the scope of *Miranda's* exclusionary rule precisely because it "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985), whereas they had no role in deciding the scope of the Fifth Amendment's exclusionary rule, which bars admission of compelled self-incrimination without regard to policy considerations of this type. Brief in *Minnick, supra;* brief in *Harvey, supra.*

With regard to § 3501, I do not remember any cases or discussions within the Department that I was aware of that related to the invocation of that statute during my tenure as Attorney General. At the same time, I certainly know of no policy that would have prevented individual U.S. Attorneys from making arguments based on this provision. In fact, while I was not aware of it at the time, I have recently learned that while I was Attorney General, at least one U.S. Attorney did invoke the provision in at least one district court case.

Finally, I do not believe the question of whether to defend the constitutionality of § 3501 came up during my tenure. What I can say, however, is that when an Act of

Congress is challenged as unconstitutional, the Department of Justice's long-standing practice, which we followed, is to defend the statute against that challenge unless there is no reasonable argument that could be made in its defense. *See, e.g.*, The Attorney General's Duty to Defend the Constitutionality of Statutes, 43 Op. Atty. Gen. 325 (1981) (Opinion of Attorney General Smith); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Atty. Gen. 275 (1980) (Opinion of Attorney General Civiletti).[1]

Under that standard, looking at the question now, it seems to me that § 3501 is easily defensible. The Fifth Amendment's text prohibits only compelled testimony. Thus, it is hard to see how it could possible require the exclusion of voluntary custodial confessions, which are the only kind that § 3501 makes admissible. While the Supreme Court did hold in *Miranda* that a confession obtained from a suspect in police custody without certain procedural safeguards could not be admitted whether or not it was voluntary, the Congress is free to modify that rule by statute unless the rule is constitutionally

[1] The Department has generally recognized one limited exception to this rule, pursuant to which it also generally will not defend statutes that it believes unconstitutionally trench on the executive branch's power, even if there is a reasonable argument that could be made in favor of the statute. *See* Civiletti opinion cited above. That exception plainly has no application in the case of § 3501, which attempts to restore, rather than contact, executive power.

required.[2] On the basis of the cases cited in the briefs I referred to above, it seems fairly clear that the Court does not view *Miranda's* exclusionary rule as a constitutional requirement. To be sure, the Supreme Court has never ruled directly on the statute's constitutionality, but the provision seems perfectly consistent with doctrinal developments since *Miranda*, and those developments seem difficult if not impossible to square with any theory under which the provision could found unconstitutional. Finally, two courts of appeals have upheld § 3501's constitutionality and none has struck it down. In fact, my personal view is that since *Miranda's* exclusionary rule was not a constitutional directive, it is not only reasonable but legally correct to say, as the Court of Appeals ruled in *Dickerson*, that § 3501 is a legitimate exercise of

[2] *See* for example, Act of September 2, 1957, 71 Stat. 595 (codified at 18 U.S.C. § 3500) ("Jencks" Act) (making non-discoverable certain material that would have been discoverable by the defense under the rule set out in *Jencks v. United States*, 353 U.S. 657 (1957) (upheld as a proper exercise of Congressional power in *Palermo v. United States*, 360 U.S. 343 (1959)).

It is perhaps worth noting that the *Palermo* court described the Jencks Act as "governing the production of statements to government agents by government witnesses," 360 U.S. at 345, and as "the rule of law governing the production of the statement at issue in this case," 360 U.S. at 351. This language is strikingly similar to that used in Justice O'Connor's majority opinion in *Davis v. United States*, 512 U.S. 451 (1994), where she noted the government's failure in arguing for the admission of incriminating statements made by a defendant in police custody "to rely . . . on 18 U.S.C. § 3501, 'the statute governing the admissibility of confessions in federal prosecutions,' *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351, 128 L.Ed.2d 349, 114 S.Ct. 1599 (1994)." *Davis*, 512 U.S. at 457 n*.

the legislative authority to deal with questions of admissibility of evidence. I should add that although I have given this question fairly careful thought, I may be wrong and the Supreme Court may disagree. I do, however, find it hard to believe that a position that two courts of appeals have backed and that I believe is correct, could not only be wrong, but could be so unreasonable that the Department of Justice would not have an obligation to advance it in defense of an enactment of Congress.

Sincerely,

/s/ Dick Thornburgh
Dick Thornburgh

EDWIN MEESE III

214 MASSACHUSETTS AVENUE, N.E.
SEVENTH FLOOR
WASHINGTON, D.C. 20002

May 12, 1999

The Honorable Strom Thurmond
Chairman
Subcommittee on Criminal Justice Oversight
United States Senate
Washington, DC 20515

Dear Mr. Chairman:

This letter responds to your questions concerning various aspects of the Department of Justice's views and positions on 18 U.S.C. § 3501 during the Administration of President Ronald Reagan. Let me provide you with a brief description of the various decisions that we made in the Department of Justice concerning the statute and then I will answer your specific questions.

After an exhaustive review of the question during my tenure as Attorney General, the Department of Justice's Office of Legal Policy concluded that the rigid exclusionary rule of *Miranda v. Arizona* was not constitutionally mandated, and that if the question were presented to it, the Supreme Court would likely agree with this conclusion. We published this study under the Department's auspices, as the conclusion of the Department of Justice on the question.

In this same study, we concluded that 18 U.S.C. § 3501 was constitutional, and that admission of voluntary confessions pursuant to its provisions was accordingly a legitimate objective for the Department to seek.

I also asked Associate Deputy Attorney General Paul Cassell to direct a search for the right case to use as a vehicle for testing the statute's constitutionality in the Supreme Court. Consequently, Department attorneys proposed a Fifth Circuit case for consideration that the Solicitor General argued was not a good one to use as a test. I decided against seeking to invoke the statute in that case, because we would have been raising the argument for the first time in a petition for rehearing en banc of a panel decision by the court. That is my recollection of the decision I made at the meeting during the spring of 1987 referred to in Charles Fried's book, *Order & Law*, at pp. 45-47.

We continued to monitor cases, and the Department did in fact argue for admission of statements pursuant to the statute in at least one later case of which I am aware. *United States v. Goudreau*. This was in a brief filed in the Eighth Circuit on October 20, 1987, several months after the meeting Professor Fried described. In that case a police officer with the Bureau of Indian Affairs was investigated and subsequently indicted for using excessive force during an arrest. He gave his version of events during an interview at the Law Enforcement Services Building on the reservation, which he attended at his supervisor's instructions. The district court suppressed his statements, finding that he should have received *Miranda* warnings before the interview. The government took an interlocutory appeal. The Department's principal argument to the Eighth Circuit was that the officer was not in custody at the time he made the statements, and therefore *Miranda* warnings were unnecessary. But we also made the alternative argument that the statements

were admissible under § 3501 regardless of whether the officer should have been given the warnings, because the officer had made the statements voluntarily. The Eighth Circuit did not reach our second argument, because it decided the statements were admissible as a result of the first argument.

I should add that during my tenure as Attorney General, so far as I am aware, neither I nor anyone else at the Department of Justice ever directed anyone in a United States Attorney's Office not to make an argument based on § 3501. Nor did we ever pull back a brief in which such an argument had been made.[1]

Thus, our position on *Miranda* was: (1) that none of *Miranda's* procedural requirements, including its exclusionary rule, is constitutionally required (and, I should add, I believe this was the position of every other prior Administration other than that of Presidents Lyndon Johnson); (2) that 18 U.S.C. § 3501 was constitutional; (3) that the Department could appropriately invoke § 3501 in the lower federal courts to seek the admission of voluntary but unMirandized statements, and in fact we did so in at least one case of which I am aware; and (4) that not only were there reasonable arguments the Department

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[1] The only decision that I made against the use of § 3501 was in the Fifth Circuit case mentioned above, where the decision was consistent with a United States Attorney's office's own reservations about invoking the section given the posture of the case. In that case, my decision was not the result of doubts about the statute's constitutionality, but the fact that the consensus in the Department was that several features made that case a poor vehicle for testing the statute's constitutionality.

could make in defense of § 3501 (the standard the Department has historically applied in considering whether to defend a federal statute), but that those arguments were correct, and that the Department should defend § 3501 against constitutional challenge throughout the federal court system. To the extent Department officials have said anything to the contrary, I would respectfully suggest that they are mistaken.

Because I share your concern about the current Administration's refusal to defend the constitutionality of section 3501, I commend you for holding an oversight hearing to explore this important issue. Thank you for this opportunity to share my views.

Sincerely,

/s/ Ed
Edwin Meese III